

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 27, 2007

COREY D. CARTWRIGHT v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2005-A-337 Cheryl Blackburn, Judge

No. M2006-02782-CCA-R3-PC - Filed February 14, 2008

The petitioner, Corey D. Cartwright, appeals the denial of his petition for post-conviction relief from his conviction for possession of over .5 grams of cocaine with the intent to sell, arguing that he was denied the effective assistance of counsel, his guilty plea was unknowing and involuntary, and the trial court's findings of fact and conclusions of law with respect to its denial of his motion to suppress failed to comply with the requirements of Rule 12 of the Tennessee Rules of Criminal Procedure. Following our review, we affirm the denial of the petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

William C. Collins, Nashville, Tennessee, for the appellant, Corey D. Cartwright.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

_____ In February 2005, the Davidson County Grand Jury indicted the petitioner on one count of possession of over .5 grams of cocaine with the intent to sell or deliver and one count of the sale of less than .5 grams of cocaine. On August 2, 2005, the petitioner entered a nolo contendere guilty plea to possession of over .5 grams of cocaine with the intent to sell, a Class B felony, in exchange for a \$2000 fine and a fourteen-year sentence in the Department of Correction as a Range II offender, with the sentence to be served consecutively to his sentence for a previous conviction. In accordance

with the terms of his guilty plea agreement, the count of the indictment charging the petitioner with the sale of less than .5 grams of cocaine was dismissed.

On September 6, 2005, the petitioner filed a *pro se* petition for post-conviction relief. On May 4, 2006, following the appointment of post-conviction counsel, the petitioner filed an amended petition in which he alleged that he was denied the effective assistance of counsel, his guilty plea was unknowing and involuntary, and his constitutional rights were violated by his illegal arrest and the subsequent search and seizure that led to the charges filed against him. Specifically, he argued that trial counsel was ineffective for failing to request that the trial court issue written findings of fact and conclusions of law with respect to its denial of his motion to suppress and for failing to adequately explain the court's ruling to him. He further argued that his lack of understanding of the trial court's suppression ruling rendered his guilty plea unknowing and involuntary and meant that he retained the right to challenge, in the post-conviction petition, the court's ruling on the suppression issue.

At the August 2, 2006, evidentiary hearing, the petitioner complained that his trial counsel did not argue his suppression motion in the manner that the petitioner wanted. He said that trial counsel failed to ask critical questions of the police officers, such as whether they had observed any illegal activity on his part or had probable cause for his arrest. He stated that he showed counsel "a variety of cases" that were similar to his, but counsel "overlooked it and didn't want to pursue that." Trial counsel later told him that he did not use unpublished cases in suppression motions. The petitioner additionally complained that trial counsel did not inform him of Rule 12 of the Rules of Criminal Procedure, which requires the trial court to make findings of fact and conclusions of law when ruling on a motion to suppress, and failed to request that the trial court comply with that rule prior to the petitioner's entry of his guilty plea. He testified that the trial judge denied his motion to suppress in open court but "did not give a reason why she denied it or ma[k]e a finding of fact, which is mandatory on Rule 12." He said that the trial judge never issued a written ruling on the motion.

The petitioner acknowledged that trial counsel explained his rights to him and that he understood "everything about [those] rights" at the time he entered his plea. He further acknowledged that he read and voluntarily signed his guilty plea petition. He believed, however, that his guilty plea was invalid because he did not have the trial court's findings of fact and conclusions of law on his motion to suppress at the time he entered his plea. The petitioner testified that, had he known the trial court's reasons for denying the motion to suppress, he might have chosen to proceed to trial in order to preserve his right to challenge the trial court's ruling in a direct appeal:

This may have persuaded my way into going to trial and maybe I could have known – if she had made a finding of fact, I maybe would have said, hey, she might be right. But then again if I read the written order stating her finding of facts, I might have said, well, she might be wrong, I might take my chances on going to trial. But it was not a finding of fact or a conclusion of law put in my suppression motion. So therefore I was just really out in the cold. I didn't know which way to go, so I really just took the plea.

On cross-examination, the petitioner acknowledged that he was present for the suppression hearing, at which the only witnesses were the police officers involved in the undercover drug purchase and surveillance. The petitioner testified that the trial judge denied the motion to suppress from the bench but never gave any findings of fact to support her ruling. He acknowledged that trial counsel discussed the suppression issue with him, including his chances of prevailing on appeal, but said that he never understood the rationale behind the judge's ruling.

The petitioner acknowledged to the post-conviction judge, who had also presided over his guilty plea hearing, that he had been advised by the court that he could not reserve the suppression issue as a certified question of law because the prosecutor would not agree to do so and that the only way he could preserve his right to appeal the suppression issue was by proceeding to trial. He said he understood that he was waiving his right to appeal the suppression issue by his guilty plea. Finally, the petitioner agreed that his decision to plead guilty was based, in part, on the fact that the prosecutor had been prepared to obtain a superceding indictment alleging that the crimes had occurred in a school zone, thereby increasing his potential punishment if convicted of the crimes.

Trial counsel, who said he was retained to represent the petitioner, testified that he could not recall any questions that the petitioner wanted him to ask at the suppression hearing that he refused to ask. He said that the trial judge denied the motion at the conclusion of the hearing, issuing findings of fact in support of her ruling from the bench. At the guilty plea hearing, he requested that the trial court also issue a written order denying the motion. Trial counsel said that he extensively discussed the trial court's ruling on the suppression issue with the petitioner, spending "quite a bit of time explaining why the motion was denied." He stated that the petitioner was a very intelligent man and that he never had any trouble dealing with him.

On cross-examination, trial counsel testified that he had been licensed to practice law for seventeen years. He said that criminal defense made up ninety-five percent of his practice and that approximately eighty to ninety percent of those cases involved drugs. After the trial court denied the motion to suppress, he discussed with the petitioner the pros and cons of taking the case to trial versus pleading guilty. He informed the petitioner that the prosecutor had announced his intention of seeking a superceding indictment alleging that the crimes occurred within a school zone, which carried a potential sentence of twenty-five to forty years at 100%. He also told the petitioner that it was unlikely that he would prevail on the suppression issue on appeal. After their discussions, the petitioner made the decision to plead guilty.

On November 15, 2006, the post-conviction court entered a written order denying the petition. The court noted that the petitioner had been given a full hearing on the suppression issue and that the trial court had issued oral findings of fact and conclusions of law in support of its ruling at the conclusion of the hearing, followed by a written order entered on August 4, 2005. The post-conviction court further noted that the transcript of the guilty plea hearing reflected that the petitioner indicated to the trial court, at the time he entered his plea, that he understood he was waiving the right to appeal the suppression issue. Accordingly, the post-conviction court found that the petitioner

had failed to meet his burden of demonstrating that he received ineffective assistance of counsel or that his guilty plea was unknowing and involuntary.

ANALYSIS

The petitioner contends on appeal that the trial court erred in finding that he received effective assistance of counsel and that he entered his guilty plea knowingly, intelligently, and voluntarily. He further contends that the trial court failed to make “essential findings” of fact in compliance with Rule 12(e) of the Tennessee Rules of Criminal Procedure. He asserts that he has not waived his right to challenge the trial court’s ruling on the suppression motion because his guilty plea, entered without benefit of adequate findings of fact in support of the trial court’s denial of the motion to suppress, was unknowing and involuntary and, thus, invalid.

I. Post-Conviction Standard of Review

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2006). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court’s application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed *de novo*, with a presumption of correctness given only to the post-conviction court’s findings of fact. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001); Burns v. State, 6 S.W.3d 453, 461 (Tenn. 1999).

II. Ineffective Assistance of Counsel

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel’s performance was deficient and that counsel’s deficient performance prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The Strickland standard is a two-prong test:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S. Ct. at 2064.

The deficient performance prong of the test is satisfied by showing that “counsel’s acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms.” Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the test is satisfied by showing a reasonable probability, *i.e.*, a “probability sufficient to undermine confidence in the outcome,” that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. In the context of a guilty plea, the petitioner must show a reasonable probability that were it not for the deficiencies in counsel’s representation, he would not have pled guilty but would instead have insisted on proceeding to trial. Hill v. Lockart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985); House v. State, 44 S.W.3d 508, 516 (Tenn. 2001).

On appeal, the petitioner claims that trial counsel was deficient for failing to ask pertinent questions during the suppression hearing, failing to request that the trial court issue detailed written findings of fact with respect to its ruling on the motion to suppress, and failing to adequately explain the trial court’s ruling to him. He asserts that, had it not been for trial counsel’s deficiencies, he would not have pled guilty but instead would have chosen to proceed to trial. The record in this case, however, fully supports the post-conviction court’s finding that counsel provided effective representation. Trial counsel’s testimony, which was accredited by the post-conviction court, established that there were no pertinent questions at the suppression hearing that he failed to ask. He said he explained in detail the trial court’s suppression ruling to the petitioner. He also went over with the petitioner the pros and cons of proceeding to trial versus accepting the plea agreement, including the greater punishment the petitioner faced if convicted of selling drugs in a school zone. Finally, he stated that the petitioner was a very intelligent man and that it was his decision to plead guilty. In sum, there is no evidence that counsel was deficient in his representation or that the petitioner would not have pled guilty were it not for counsel’s alleged deficiencies. We conclude, therefore, that the petitioner is not entitled to post-conviction relief on the basis of his claim of ineffective assistance of counsel.

III. Involuntary Guilty Plea

In an interrelated claim, the petitioner also contends that his guilty plea was not knowingly, voluntarily, or intelligently entered because, at the time he entered his plea, he did not understand the trial court’s ruling on the motion to suppress. He argues that, had he been fully informed of the trial court’s basis for denying the motion to suppress, he might have taken his chances at trial, where a conviction would not have resulted in the waiver of his right to challenge the trial court’s ruling on the suppression issue on appeal. The State argues that the evidence supports the post-conviction court’s finding that the petitioner freely, voluntarily, and knowingly entered his plea. We agree with the State.

When analyzing a guilty plea, we look to the federal standard announced in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969), and the state standard set out in State v. Mackey, 553 S.W.2d 337 (Tenn. 1977). State v. Pettus, 986 S.W.2d 540, 542 (Tenn. 1999). In Boykin, the United States Supreme Court held that there must be an affirmative showing in the trial court that a guilty plea was voluntarily and knowingly given before it can be accepted. 395 U.S. at 242, 89 S. Ct. at 1711. Similarly, the Tennessee Supreme Court in Mackey required an affirmative showing of a voluntary and knowledgeable guilty plea, namely, that the defendant has been made aware of the significant consequences of such a plea. Pettus, 986 S.W.2d at 542.

A plea is not “voluntary” if it results from ignorance, misunderstanding, coercion, inducements, or threats. Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court must determine if the guilty plea is “knowing” by questioning the defendant to make sure he or she fully understands the plea and its consequences. Pettus, 986 S.W.2d at 542; Blankenship, 858 S.W.2d at 904. Because the plea must represent a voluntary and intelligent choice among the alternatives available to the defendant, the trial court may look at a number of circumstantial factors in making this determination. Blankenship, 858 S.W.2d at 904. These factors include: (1) the defendant’s relative intelligence; (2) his familiarity with criminal proceedings; (3) whether he was represented by competent counsel and had the opportunity to confer with counsel about alternatives; (4) the advice of counsel and the court about the charges against him and the penalty to be imposed; and (5) the defendant’s reasons for pleading guilty, including the desire to avoid a greater penalty in a jury trial. Id. at 904-05.

The transcript of the suppression hearing reveals that the trial court articulated its reasons for denying the motion to suppress in its oral findings of fact and conclusions of law issued at the conclusion of the suppression hearing. In addition, trial counsel testified that he fully explained to the petitioner, in several different conversations, the trial court’s reasons for denying the motion to suppress. When the petitioner expressed at the guilty plea hearing his desire to reserve the suppression issue as a certified question of law, the trial court explained to him at length why he could not do so and how the only way for him to preserve the right to appeal the issue was to proceed to trial. Faced with the choices available to him, the petitioner opted to accept the plea agreement:

[THE PETITIONER]: Well, I was – I was wanting to know, could I reserve the right to appeal the certified question of law –

THE COURT: Right.

[THE PETITIONER]: -- to the motion to suppress?

THE COURT: Well, apparently, in order to do that, the State has to agree to that. And then I would have to find -- and I’d have to agree to it. But I would have to find that that would be the determining factor in your case. . . . So it’s not just the State, I would have to agree that that was a determining factor and that your case couldn’t go forward without that. Otherwise, the case would be dismissed; okay.

But the State has to agree to that. And they don't have to. So in order for you to preserve that question -- and, again, this is strictly up to you -- is you would have to go to trial.

[THE PETITIONER]: I guess I can live with it.

THE COURT: Okay. Well, I mean, it's your choice. Okay. I don't want you to feel like you think, well, you had to do this, because you don't.

[THE PETITIONER]: I can live with it.

The transcript of the guilty plea hearing further reflects that the petitioner responded in the affirmative when asked if trial counsel had explained the charges against him, the potential punishment, and his plea agreement. He informed the trial court that he had read the plea agreement and had no questions about it, that he was taking blood pressure medication but it did not affect his ability to think, and that he understood what he was doing when entering into the guilty plea agreement. We, therefore, conclude that the record fully supports the post-conviction court's finding that the petitioner's guilty plea was knowingly, intelligently, and voluntarily entered.

IV. Suppression Ruling

As his final issue, the petitioner contends that the trial court's ruling on his motion to suppress was inadequate because it failed to contain "essential findings" of fact, as required by Rule 12(e) of the Rules of Criminal Procedure. Tennessee Rule of Criminal Procedure 12(e) states:

The court shall decide each pretrial motion before trial unless it finds good cause to defer a ruling until trial or after a verdict. The court shall not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court shall state its essential findings on the record.

The State argues, *inter alia*, that the petitioner has waived this issue by his plea of nolo contendere. We agree with the State. A criminal defendant who enters a plea of guilty or nolo contendere has the right to appeal a certified question of law that was explicitly reserved at the time of the guilty plea, a sentence that was not the subject of a plea agreement, or an issue that is apparent from the record that was not waived as a matter of law by the plea of guilty or nolo contendere. See Tenn. R. App. P. 3(b)(2); Tenn. R. Crim. P. 37(b)(2). Furthermore, a defendant who enters a knowing and voluntary guilty plea waives all non-jurisdictional defects and constitutional infirmities. See State v. McKinney, 74 S.W.3d 291, 306 (Tenn. 2002); Pettus, 986 S.W.2d at 542.

CONCLUSION

Based on our review, we conclude that the petitioner has failed to show that he is entitled to post-conviction relief from his conviction. Accordingly, we affirm the denial of his petition for post-conviction relief.

ALAN E. GLENN, JUDGE